Joy Technologies, Inc. *and* Walter L. Burgard and International Association of Machinists and Aerospace Workers, Local 1842 of District Local No. 83, AFL–CIO, Party to the Contract

International Association of Machinists and Aerospace Workers, Local 1842 of District Local No. 83, AFL–CIO *and* Walter L. Burgard and Joy Technologies, Inc., Party to the Contract. Cases 6–CA–22290 and 6–CB–8061

January 15, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 20, 1990, Administrative Law Judge Lowell Goerlich issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent Employer filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaints allege: (1) that the Respondent Union violated Section 8(b)(1)(A) and (2) by demanding that the Respondent Employer transfer a higher paying position from one plant to another and award that position to a union committeeman, pursuant to the superseniority clause in the parties' collective-bargaining agreement; (2) that the Respondent Employer violated Section 8(a)(1), (2), and (3) by acquiescing to the demand to the detriment of other employees; and (3) that both Respondents violated the Act by maintaining an overly broad superseniority provision in their collective-bargaining agreement. The judge dismissed the complaints. For the reasons set forth below, we disagree and find the violations alleged.

I. FACTUAL FINDINGS

The facts are undisputed. The Respondent Employer manufactures and sells coal-mining equipment. It operates three plants known as plants 1, 2, and 3. A general repair person (GRP) retired and this resulted, after several personnel moves not in issue here, in a vacant GRP position in plant 1 on the second shift. No employee bid on this position.

Under the collective-bargaining agreement Beightol was required to return to the vacant GRP position.[1] Pursuant to the agreement, the Employer announced its intention to recall Beightol to the GRP position, which was in plant 1. Beightol, the senior qualified employee, had been laid off from the GRP position. Subsequent to the layoff, Beightol was reassigned, in accordance with the labor agreement, to the position of cleaning service person (CSP) in plant 2, a lower-grade position than GRP. Beightol was also the sole union committeeman for plant 2. The transfer to plant 1 would have resulted in Beightol no longer being able to function as plant 2 representative.[2] The Respondent Union argued not only that the superseniority provision of the collective-bargaining agreement[3] required that Beightol remain within his area of representation, but also that the higher paying position of GRP be transferred to plant 2, shift 1, and awarded to Beightol. The Respondent Employer acquiesced to the Respondent Union's demand. This caused a chain reaction in the work force the result of which was, among other things, that the Charging Party, Burgard, was bumped from the first to the second shift for a period of 6 weeks.

[1] The collective-bargaining agreement provides that:

> Any employee who either when recalled or to avoid layoff, finds it necessary to accept work which is in a different job classification and/or department (except his old department), from his previous regular job classification must return to his regular job classification if and when such job classification becomes available. In this event, where applicable, upon the employee's return to his job classification, the employee will then have the privilege of returning to his previous regular Machine Tool if and when it becomes available.

Contrary to the dissent's implication, the collective-bargaining agreement does not expressly require the Respondent Employer either in plant 1 or in plant 2 to give Beightol a GRP position. The only pertinent contractual provision, quoted above, was directed to employees and not to the Respondent Employer, and was in fact initially interpreted by the Employer as requiring that Beightol take the vacant GRP position in *plant 1*.

[2] The judge found, and it is undisputed, that Beightol was a union agent who must be on the job to accomplish duties directly related to administering the collective-bargaining agreement. See *Gulton Electro-Voice, Inc.*, 266 NLRB 406, 409 (1983).

[3] The superseniority provision is as follows:

> The Union Department Stewards and the Shop Committee shall head the Seniority List when certified by the Union to the Company. However, when any employee ceases to be a Steward or Committeeman, such employee shall take his regular place on the Seniority List. When an entire shift in a department is not working, Steward superseniority on that shift in that department immediately ceases. If and when the Steward's shift would start, the Steward's super-seniority becomes effective. Employees working overtime onto a shift previously not working does not constitute a start up of that shift. The above defined seniority will not apply for the purposes of shift preference, job bidding, machine tool preference, overtime entitlement or scheduling of vacations. When a Committeeman or Steward is certified to represent employees on all or any of the shifts such Steward or Committeeman cannot be displaced by other employees for any reason when certified or where he may have moved by his election to exercise his Company seniority as provided in Item 75 hereof.

II. ANALYSIS AND CONCLUSIONS

Based on the foregoing facts, the judge found that the superseniority provision was applied in a geographically defensive manner to allow Beightol to remain in the area he represented. The judge also found that the provision itself was not overly broad. We disagree.

Because the superseniority clause on its face permits the committeeman to invoke superseniority for purposes going beyond layoff and recall,[4] it is presumptively unlawful under *Dairylea Cooperative*.[5] The burden of rebutting a presumptively illegal superseniority provision rests on the parties asserting its lawfulness.

Under the facts of this case, had the Respondent Employer done as it had originally intended to do and transferred Beightol to plant 1, it would have deprived the employees in plant 2 of their representative. The Union had a legitimate interest in preventing that occurrence. Thus, the Union acted lawfully to the extent that it insisted that Beightol remain in plant 2. Had this been the extent of the parties' action, it could aptly be described as ''geographically defensive.'' As the Board stated in *Mechanics Educational Society Local 56 (Revere Copper)*, 287 NLRB 935, 936 (1987), ''The exercise of superseniority to protect a steward from layoff from his *area of representation* is consistent with *Dairylea Cooperative* . . . but what is permitted is only the *minimal exercise* of such protection.'' (Emphasis added, citation omitted.)[6] Here, however, the parties additionally agreed to transfer the higher paying position of GRP from plant 1 to plant 2 and to award that position to Beightol to the detriment of other unit employees. This action went beyond what was minimally necessary for Beightol to remain in a job in his area of representation and thus ran afoul of the Act.[7]

Further, the fact that Beightol might have lost wages by remaining a CSP or have resigned as a committeeman in order to secure the GRP position is not dispositive of the lawfulness of the application of the superseniority clause:

> [I]t nevertheless remains the union's task to build and maintain its own organization, and where the immediate problem is simply a matter of encouraging employees to be stewards a union can alone handle the situation simply by paying employees or by giving them other nonjob benefits . . . . [*Dairylea*, supra at 659.]

The Respondent Employer argues that because Beightol would have spent the majority of his time on union business, the transfer of the additional GRP position to plant 2, which already had a first-shift GRP position, was necessary in order to ensure that the work of the GRP was performed. The fallacy of this argument is that it presupposes that it was lawful for the Respondents to agree to transfer the GRP position to plant 2 initially. The Respondent Employer also contends that the recall provision of the collective-bargaining agreement merely requires that the displaced employee be returned to the classification from which he was displaced. It does not, according to the Respondent Employer, prohibit it from exercising its managerial discretion to transfer the classification to a different plant. The policy of the Act, however, generally is to insulate job benefits from union activities.[8] Departure from that policy must be justified.[9] Contrary to any implication by the dissent, the record contains no evidence of any instance where the contract was in-

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[4] The clause, which is fully set forth above, clearly states that the committeeman cannot be ''displaced by other employees for any reason.''

[5] 219 NLRB 656 (1975), enfd. sub nom. *NLRB v. Teamsters Local 338*, 531 F.2d 1162 (2d Cir. 1976).

[6] The fact that here we are dealing with a transfer rather than a layoff is a distinction without significance. See, e.g., *Auto Workers (Scovill, Inc.)*, 266 NLRB 952, 953 fn. 9 (1983) (steward superseniority for defensive shift maintenance like layoff protection and presumptively lawful).

[7] Our dissenting colleague does not dispute the *Dairylea Cooperative* rule that a superseniority clause going beyond layoff and recall, like the one here, is presumptively illegal, and that the heavy burden of rebutting that presumption falls on the party asserting the clause's lawfulness, in this case, the Respondents. Neither does our dissenting colleague contest *Revere Copper's* requirement that a lawful superseniority clause must go no further than conferring the minimal protection necessary to preserve the steward's area of representation. Most importantly, our dissenting colleague does not specifically challenge our finding that transferring the GRP position from plant 1 to plant 2 and awarding it to Beightol—a privilege, so far as the record shows, not afforded any other unit employee—went beyond what was minimally necessary for Beightol to remain in his area of representation. Our dissenting colleague maintains that the Respondents did not violate the Act because they freely and in ''good faith'' negotiated an agreement to transfer the GRP position to plant 2. We perceive two flaws in the dissent's analysis. First, the dissent ignores the adverse impact of the transfer on other employees. Second, the dissent's considerations are beside the point under the cases discussed above. The question is whether the result of the Respondents' ''good faith'' efforts—the transfer of the GRP position to plant 2, which benefited committeeman Beightol—was minimally necessary for Beightol to do his committeeman's job. If not, then the transfer unjustifiably discriminated against and coerced all those unit employees who were not committeemen including Burgard, who was bumped to the second shift as a result.

Of course, we support dispute resolution through negotiations. But superseniority clauses must be negotiated and applied within certain legal boundaries. See *Dairylea Cooperative*, supra; *Revere Copper*, supra. An employer and a union cannot insulate themselves from the Act by the simple expedient of ''agreeing'' to violate employee rights. The principle behind the justification for transfer of the GRP position relied on by our dissenting colleague—that the parties in ''good faith'' agreed to the transfer of the GRP job to plant 2—was also rejected in *Dairylea*, supra at 657. This justification cannot overcome the presumption of illegality of the Respondents' interpretation of the superseniority clause. Were it otherwise, the *Dairylea* requirements would be meaningless because superseniority provisions are usually negotiated in ''good faith.'' Neither we nor our dissenting colleague propose to change those requirements now.

[8] *Radio Officers v. NLRB*, 347 U.S. 17 (1954).

[9] *Dairylea*, supra.

terpreted to permit the transfer of job classifications to accommodate other unit employees, and there is no contract language that could be so interpreted. Here it is clear that the Respondent Employer transferred the GRP position to plant 2 solely to ensure that Beightol would remain union committeeman and obtain the higher paying position. That worked to the detriment of other unit employees and has not been shown to have been necessary.

Consequently we find that the Respondent Union by demanding that the GRP position be transferred to plant 2 and that Committeeman Beightol be awarded that position violated Section 8(b)(1)(A) and (2) of the Act. We also find that the Respondent Employer, by agreeing to the Respondent Union's demand, violated Section 8(a)(3), (2), and (1) of the Act.

The complaint also alleges that the Respondents violated the Act by maintaining an overly broad superseniority clause in their collective-bargaining agreement.

The last sentence of the superseniority provision states that a ''Committeeman cannot be displaced by other employees *for any reason* . . . .'' (Emphasis added.) As discussed above, the provision is overly broad on its face and thus presumptively unlawful. Not only have the Respondents failed to rebut the presumption, but the Respondent Employer conceded as much, as the judge found. The judge, notwithstanding the foregoing, found that when the last sentence of the superseniority provision is read together with the rest of the clause, which sets forth certain restrictions on superseniority, the last sentence ''may'' be construed lawfully. (The full text of the clause is set forth at fn. 3, supra.)

We do not agree with the judge's construction. As the provision is written, the restrictions do not purport to apply to displacing a committeeman. Moreover, even under the judge's reading, the superseniority clause is unlawful. For example, if the Respondent Employer decided to reduce the number of GRP's in plant 2, it would appear that Beightol could, even if he had the least natural seniority, exercise his superseniority and remain a GRP. This is because downgrading is not listed as an exception to the superseniority clause.[10] As set forth above, such job retention is unnecessary for Beightol to remain in his area of representation.

Consequently we find that the Respondent Union has violated Section 8(b)(1)(A) and (2), and the Respondent Employer has violated Section 8(a)(3), (2), and (1) by maintaining the superseniority clause in their contract.

[10] The exceptions, as listed in the superseniority clause, are: shift preference, job bidding, machine tool preference, overtime, and scheduling vacations.

CONCLUSIONS OF LAW

1. Joy Technologies, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By demanding that the Respondent Employer transfer a higher paying position from one plant to another and then demanding that the position be filled by a union committeeman, the Respondent Union has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act.

4. By transferring a higher paying position from one plant to another and then filling that position with a union committeeman, the Respondent Employer has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) of the Act.

5. By maintaining an overly broad superseniority provision in the collective-bargaining agreement the Respondent Union and the Respondent Employer have engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) and Section 8(a)(1), (2), and (3) of the Act respectively.

6. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order that they cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

We have found that the superseniority clause is unlawful and we shall order that the Respondents cease and desist from maintaining and enforcing the clause. As we have also found that the clause was unlawfully applied, we shall order the Respondent Employer to return the GRP position to plant 1 and to rescind all personnel actions that were a consequence of the Respondents' unlawful conduct. We shall also issue a standard make-whole order for any monetary losses suffered by the employees as a result of the Respondents' unlawful conduct to be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that:

A. Respondent Joy Technologies, Inc., Franklin, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing superseniority provisions in its collective-bargaining agreement with International Association of Machinists and Aerospace

Workers, Local 1842 of District Local No. 83, AFL–CIO according superseniority to union officials that is not required to further the effective administration of the collective-bargaining agreement.

(b) Discriminating against employees by conferring benefits of superseniority on union officers that were not necessary for the effective administration of the collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Return the position of GRP to plant 1 and rescind all personnel actions which were a consequence of the unlawful conduct.

(b) Jointly and severally with the Respondent Union make its employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, plus interest.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its establishment in Franklin, Pennsylvania, copies of the attached notice marked ''Appendix A.''[11] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent Employer's authorized representative, shall be posted immediately upon receipt, and maintained for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Employer has taken to comply.

B. Respondent International Association of Machinists and Aerospace Workers, Local 1842 of District Local No. 83, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and enforcing superseniority provisions in its collective-bargaining agreement with Joy Technologies, Inc. according superseniority to union officials that is not required to further the effective administration of the collective-bargaining agreement.

(b) Causing or attempting to cause the Respondent Employer to discriminate against Walter L. Burgard and other employees by conferring superseniority benefits on union officials that are not necessary for the effective administration of the collective-bargaining agreement.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify the Respondent Employer in writing that it has no objection to returning the GRP position to plant 1 and to rescinding all personnel actions that were a consequence of the unlawful conduct.

(b) Jointly and severally with the Respondent Employer make any unit employees whole for any loss of earnings they may have suffered as a result of the discrimination against them, plus interest.

(c) Post at its offices and meeting halls copies of the attached notice marked ''Appendix B.''[12] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent Union has taken to comply.

MEMBER RAUDABAUGH, dissenting in part.

I disagree with my colleagues' position that the good-faith efforts of the Employer and the Union to accommodate their mutual interests were unlawful under the Act.

In brief, the facts are that employee Beightol had been laid off from a GRP position and was holding a CSP position in plant 2. A GRP vacancy came open in plant 1. Under the contract, as interpreted, the Employer was obligated to return Beightol to a GRP position if one came open. The problem was that Beightol was the sole union committeeman (grievance handler) for plant 2. Hence, to return Beightol to the GRP position in plant 1 would mean that plant 2 would be stripped of representation. Hence, the Employer and the Union agreed to transfer the GRP position to plant 2 and give it to Beightol.[1] In that way, Beightol would

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[12] See fn. 11, supra.

[1] My colleagues assert that the Respondents ''went beyond what was minimally necessary for Beightol to remain in his area of representation.'' The assertion is incorrect. Beightol's area of representation was plant 2. Absent the agreement of Respondents, Beightol would have been removed from plant 2.

occupy the GRP position, and plant 2 would have representation. The change served the legitimate representational interests of the employees and the Union. Further, it was acceptable to the Employer. In this latter regard, the Employer previously had three GRPs in plant 1 and one in plant 2. As a result of the change, it now had two GRPs in each plant. Although plant 1 has two shifts and plant 2 has one shift, the union committeeman spends some of his worktime on representational matters. In short, the Employer found that it could live with the new situation, and the Union found that the new situation satisfied its representational needs. In these circumstances, I would not condemn as unlawful the good-faith effort to accommodate legitimate interests.[2] Instead, I would agree with the judge that the parties used superseniority in a legitimate ''geographically defensive manner.''[3]

[2] My colleagues assert that I have ignored the adverse impact that the grant of superseniority will have on employees. I have not done so. A grant of superseniority will necessarily have an adverse impact on those employees who have only natural seniority. However, where, as here, the superseniority is justified, it is lawful notwithstanding that impact. See *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983).

[3] My colleagues contend that Beightol could have remained a CSP in plant 2. However, the contract required that he be given a GRP position if one became available. The contract left the parties free to locate that GRP position wherever they chose.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain and enforce superseniority provisions in our collective-bargaining agreement with International Association of Machinists and Aerospace Workers, Local 1842 of District Local No. 83, AFL–CIO according superseniority to union officials that is not required to further the effective administration of the collective-bargaining agreement.

WE WILL NOT discriminate against any employees by conferring benefits of superseniority on union committeemen that are not necessary for the effective administration of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL return the position of general repair person to plant 1 and rescind all personnel actions which were a consequence of transferring the position.

WE WILL jointly and severally with the Union make any unit employees whole for any loss of earnings they may have suffered as a result of transferring the position, with interest.

JOY TECHNOLOGIES, INC.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain and enforce superseniority provisions in our collective-bargaining agreement with Joy Technologies, Inc. according superseniority to union officials that is not required to further the effective administration of the collective-bargaining agreement.

WE WILL NOT cause or attempt to cause Joy Technologies, Inc. to discriminate against any employee by conferring benefits of superseniority on union officials that are not necessary for the effective administration of the collective-bargaining agreement.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify Joy Technologies, Inc., in writing, that we have no objection to returning the position of general repair person to plant 1 and to rescinding all personnel actions which were a consequence of transferring the position.

WE WILL jointly and severally with the Employer make any unit employees whole for any loss of earnings they may have suffered as a result of transferring the position, with interest.

INTERNATIONAL ASSSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL 1842, DISTRICT LOCAL NO. 83, AFL–CIO

Kim Siegert, Esq., for the General Counsel.
R. Stanley Mitchel, Esq., of Pittsburgh, Pennsylvania, for Joy Technologies, Inc.
Eugene Marcaccio, Grand Lodge Representative, of Stanford, Connecticut, for International Association of Machinists and Aerospace Workers, Local 1842 of District Lodge No. 83, AFL–CIO.
Walter L. Burgard, Esq., of Franklin, Pennsylvania, pro se.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The original charge in Case 6–CB–8061, filed on December 5, 1989, by Walter Burgard was served by certified mail on International Association of Machinists and Aerospace Workers, Local 1842 of District Local No. 83, AFL–CIO (the Union or the Respondent Union) on December 6, 1989. A first amended charge was filed by Burgard on March 1, 1990, and served on the Respondent Union on or about March 2, 1990. A second amended charge was filed by Burgard on March 2, 1990, and served on the Respondent Union on or about March 2, 1990.

The original charge in Case 6–CA–22290 filed by Walter L. Burgard on December 5, 1989, was served by certified mail on Joy Technologies, Inc. (Joy, the Respondent Employer, or the Company) on December 6, 1989. A first amended charge was filed by Burgard on March 1, 1990, and served on the Respondent Employer on or about March 1, 1990.

An order consolidating cases was issued on March 2, 1990, and the complaints were duly served on the Respondents. In the complaints, among other things, it is alleged that the Respondent Employer violated Section 8(a)(1), (2), and (3) of the National Labor Relations Act (the Act) and that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by a union committeeman's exercise of superseniority. The Respondents filed timely answers denying that they had engaged in the unfair labor practices alleged.

The matter came on for hearing on June 15, 1990, at Franklin, Pennsylvania. Each party was afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record[1] in these cases and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT, CONCLUSIONS, AND REASONS THEREFOR

I. THE BUSINESS OF THE EMPLOYER

At all times material, the Respondent Employer, a corporation with an office and place of business in Franklin, Pennsylvania, is engaged in the manufacture and nonretail sale of coal mining equipment.

During the 12-month period ending February 29, 1990, the Respondent Employer, in the course and conduct of its business operations described above, purchased and received at its Franklin, Pennsylvania facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

During the period of time described above, the Respondent Employer, in the course and conduct of its operations described above, shipped from its Franklin, Pennsylvania facility products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania.

The Respondent Employer is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR UNION INVOLVED

The Respondent Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) and Section 8(b)(4) of the Act.

III. THE UNFAIR LABOR PRACTICES

Material Facts

Paul Pleger, a general repair person (GRP) employed in the Respondent Employer's maintenance department, retired on November 1, 1989, from a job in plant 1 on shift 2[2] Employee Albert Kachik, a GRP, bid on Pleger's vacant job and was awarded the job. This circumstance resulted in the vacancy of Kachik's job. Employee Regis Reed successfully bid for Kachik's job. Reed's vacant job was then posted, but there were no qualified bidders; thus employee Lynn Rembold, who was a GRP on the first shift, was realigned to the second shift. Rembold's vacant job became subject to recall (''Somebody not working in the classification who had rights to recall back to it''). Thus the Respondent ''offered the position to the senior qualified employee laid off from the position,'' who ''would have been Randy'' Beightol, the union committeeman for plant 2[3] maintenance department.[4]

Beightol at the time was a cleaning service person (CSP) or janitor on the first shift at plant 2.[5] Prior to filling the job as CSP Beightol had been a GRP, which was a higher graded position than CSP.

Had he not been a committeeman, according to Daryl Beam, the Employer's labor relations manager, Beightol would have been contractually required to take the job Rembold had vacated in plant 1. Beam drew his opinion from the following provision of the contract between the Union and the Company.

> E. Any employee who either when recalled or to avoid layoff, finds it necessary to accept work which is in a different job classification and/or department (except his old department), from his previous regular job classification *must* return to his regular job classification if and when such job classification becomes available. In this event, where applicable, upon the employee's return to his job classification, the employee will then have the privilege of returning to his previous regular Machine Tool if and when it becomes available. [Emphasis added.]

[1] There being no objections thereto, counsel for the General Counsel's motion to correct transcript is granted and the transcript is corrected.

[2] The Employer operated three plants; two are located in Franklin, Pennsylvania, and the third is located in Reno, Pennsylvania.

[3] Under the contract there were to be three committeepersons at plant 1 and one at plant 2. A transfer of Beightol to plant 1 would have caused Beightol to lose his committee position in plant 1.

[4] Departmental seniority was observed.

[5] Plant 2 had only one shift.

Nevertheless, Rembold's GRP job was not filled; instead, Beightol was placed in a GRP position in plant 2 on the first shift. Beam explained:

> [O]riginally, we had thought Randy should move from Plant 2 to Plant 1 . . . .
>
> We met with the union and mentioned to them that's the way we thought this should go. There was a disagreement from the union on it, and we considered what they were saying, took a look at the contract language, and said, okay, the two things acting here that we could see was the idea of—he had to take a recall to his regular job. And the super seniority language did not exclude *plant preference from being considered*, and the super seniority issue all acted together to give him that position at Plant 2.[6] [Emphasis added.]

Although Bill Knox, senior to Beightol, was a GRP already on the first shift at plant 2 at the time, Beightol was given the GRP on the first shift at plant 2. According to Beam, when Beightol became eligible for a GRP job he bumped Knox because of his superseniority. Knox was ''considered out of that position.'' Knox, nevertheless, was continued in plant 2 on a temporary basis. His permanent job would have been in plant 1. ''[K]nowing that Randy was the shop committeemen [sic] and was out of the . . . plant frequently on union business, we needed someone to cover for him when he was on union business, so there was a shift realignment that was posted.''[7] ''And Bill Knox, since he was then, at that point, considered out of a permanent position at Plant 2, bid on that position as a shift realignment.'' Knox was the only bidder. Thus, after all the alleged contractual maneuvering was completed, Beightol and Knox both ended up as GRPs in plant 2 on shift 1.

On October 30, 1989, Burgard filed a grievance complaining that the labor agreement was violated when Beightol was not transferred to plant 2, shift 2.

The grievance was answered, ''The action that recently transpired relating to this matter was a result of mutual agreement between the Company and the union committee as the contract language did not specifically address this instance. It was felt that this nonprecedential arrangement satisfied both parties and caused the least amount of disruption to the workforce and the department.'' (G.C. Exh. 6.)

Under the provisions of the contract the grievance could not be submitted to arbitration.

On March 26, 1990, Albert Kachik submitted a shift preference request[8] for a first-shift GRP job in plant 1. His request was granted. As a result Burgard was bumped on April 2, 1990, from the first shift to the second shift. Kachik held greater seniority than Burgard. Burgard asserted that his transfer to shift 2 would not have occurred if Beightol had been transferred to plant 1. According to Burgard, had Beightol been transferred to plant 1 on the second shift at the time of Pleger's retirement, Kachik would not have bumped him but would have bumped Rembold. ''If Beightol had went to the second shift originally, when the man bumped me, he would have not bumped me, he would have bumped a younger maintenance man.'' Had Beightol been transferred to the second shift, Rembold would not have been moved from the first shift to the second shift. Thus, when Kachik exercised his preference for the first shift, Rembold, whose seniority was less than that of Burgard, would have been bumped to the second shift rather than Burgard. Because of Beightol's remaining in plant 2, Burgard became the youngest in seniority on the first shift, whereas if Beightol had been transferred to the second shift in plant 2, Rembold would have been the youngest in seniority on the first shift and the first to be bumped to the second shift. By Beightol's remaining in plant 2, Burgard was deprived of seniority protection that would have allowed him to remain on shift 1 when Kachik exercised his senior seniority to bump on to the first shift. Burgard is now on the first shift.

CONCLUSIONS AND REASONS THEREFOR

The last sentence of section 103 of the contract, supra, standing alone, to wit: ''When a Committeeman or Steward is certified to represent employees on all or any of the shifts such Steward or Committeeman cannot be displaced by other employees for any reason when certified or where he may have moved by his election to exercise his Company seniority as provided in Item 75 hereof'' is obviously an overly broad provision.[9] See *Dairylea Cooperative*, 219 NLRB 656

[6] The superseniority provision of the contract is as follows:

> 103. The Union Department Stewards and the Shop Committee shall head the Seniority List when certified by the Union to the Company. However, when any employee ceases to be a Steward or Committeeman, such employee shall take his regular place on the Seniority List. When an entire shift in a depatment is not working, Stewad super-seniority on that shift in that department immediately ceases. If and when the Steward's shift would start, the Steward's super-seniority becomes effective. Employees working overtime onto a shift previously not working does not constitute a start up of that shift. The above defined seniority will not apply for the purposes of shift preference, job bidding, machine tool preference, overtime entitlement or scheduling of vacations. When a Committeeman or Steward is certified to represent employees on all or any of the shifts such Steward or Committeeman cannot be displaced by other employees for any reason when certified or where he may have moved by his election to exercise his Company seniority as provided in Item 75 hereof.

[7] ''A shift realignment occurs when you have a number of people at one plant and you want to move one or more, whatever the number you need, to another plant. There's no increase in the work force, you just redistribute the people.''

[8] The provision of the contract is as follows:

> 75(a) In order for the Company to carry on efficient operations, it is necessary to maintain a normal proportion of skilled and unskilled help on all shifts. However, the Company will grant an employee shift preference and at that time, machine tool preference within his Job Classification, according to seniority schedule. At the time the employee exercises a shift preference he will also be given, where applicable, sectional or *plant preference* provided these changes do not curtail the efficiency of such operations. Requests by the employee for shift change if granted on account of seniority shall not be made more than once a year. Employees displaced by provisions of this paragraph may exercise seniority in their classification to obtain their desired shift as well as *plant* or section. However, this action shall not mean that this employee has used the shift preference rights provided for in this paragraph. [Emphasis added.]

[9] The Respondent Employer concedes this proposition in its posthearing brief at Br. 5.

(1975), enfd. sub nom. *Teamsters Local 338 v. NLRB*, 531 F.2d 1162 (2d Cir. 1976).

However, when that sentence is read with the remainder of section 103, the sentence is so limited that section 103 may be construed as having a narrower application barring stewards and committeemen from exercising superseniority for any reason other than in conformity with the approved superseniority construction of the Act.

Because under section 103, the restraints on the exercise of superseniority are not applicable to plant preference, the question here is whether committeeman Beightol's exercise of seniority to remain in plant 2 ran afoul of the proscriptions of the Act.

It seems clear from the evidence that Beightol was a union agent who came within the terms of *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983).[10] Indeed his union activities were of such an extensive and demanding nature that employee Knox was continued in plant 2 to cover Beightol's absences on union duties.

As such an agent, Beightol was entitled to superseniority under the contract and the statute; however, the General Counsel contends that he was not entitled to exercise superseniority for the purpose he did, plant preference. Had Beightol been restrained from exercising superseniority as a committeeman to remain in plant 2, he would have lost his committeeman's job in plant 2 and plant 2 would have been left without his union representation for the maintenance department.[11] Thus the employees' choice of their representative would have been nullified. This situation seems not unlike the Board's observations in *Electronic Workers IUE Local 663 (Gulton Electro Voice)*, 276 NLRB 1043, 1044 (1985). ''Bumping a zone steward to a job in another zone would disrupt the continuity in the first zone's employees' union representation. Therefore, granting a zone steward protection against bumping from his zone would be defensive in nature and akin to the shift protection found lawful in *Scovill* [266 NLRB 952 (1983)].''

A fortiori, transferring a committeeman from one plant to another would appear to have a like disruptive effect. The continuity of the committeeman's representation in the plant from which he is transferred would be interrupted.

By allowing Beightol to utilize his superseniority, under the circumstances, for plant preference, his superseniority was exercised in a geographically defensive manner. Such utilization of superseniority is not proscribed by the Act. The finding is for the Respondents.

[Recommended Order for dismissal omitted from publication.]

[10] As stated in *Gulton*, ''agents of the union, who must be on the job to accomplish their duties directly related to administrating the collective-bargaining agreement.'' 266 NLRB at 409.

[11] The Respondent Employer asserts at Br. 4, ''a new committeeperson would have to be elected for Plant 2 and that committeeperson would be out of the classification on union business most of the time, thus Joy would need another GRP to take his place. Therefore there was an economic justification for agreeing to the Union's position and moving the new GRP position to Plant 2 where no further changes would be required to have the necessary work performed.''